97-1625

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

CALIFORNIA DENTAL ASSOCIATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN COLLEGE FOR ADVANCEMENT IN MEDICINE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT A. SKITOL
DRINKER BIDDLE & REATH LLP
901 Fifteenth Street, NW
Suite 900
Washington, DC 20005
(202) 842-8800

WILLIAM C. MACLEOD*
ELIZABETH TONI GUARINO
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, NW
Washington, DC 20007
(202) 342-8400

Counsel for Amicus Curiae

*Counsel of Record

May 29, 1998

QUESTION PRESENTED

Whether, under Section 4 of the Federal Trade Commission Act, the FTC's jurisdiction over entities "organized to carry on business for [their] own profit or that of [their] members" extends to nonprofit professional associations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICUS CURIAE

The American College for Advancement in Medicine (ACAM) is a nonprofit medical society dedicated solely to scientific, educational and public health purposes. ACAM's activities consist of educating physicians, advancing and supporting scientific research, and developing public awareness of emerging therapies in complementary/alternative medicine and preventive medical practices. ACAM is an accredited sponsor of the Accreditation Council for Continuing Medical Education (ACCME). Membership in ACAM requires an unrestricted license to practice medicine. ACAM has nearly 1000 members.[1/]

As set forth in its Articles of Incorporation, ACAM is organized solely for nonprofit purposes and is prohibited from carrying on any activity for the profit of its members or distributing any gains, profits or dividends to its members.[2/]

1/ Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.2(a) of the Rules of this Court, *amicus* states that both parties have granted written consent to the filing of this brief. The parties' consent letters have been filed with the Clerk of the Court.

2/ ACAM's Articles of Incorporation state in pertinent part:

> This corporation is not organized, nor shall it be operated for pecuniary gain or profit, and it does not contemplate the distribution of gains, profits, or dividends to its members and is organized solely for nonprofit purposes. The property, assets, profits and net income of this corporation are irrevocably dedicated to scientific and educational purposes,

ACAM operates in fact as a bona fide nonprofit medical society.

As a nonprofit professional association, ACAM has a strong interest in the jurisdictional issue raised in the petition for certiorari. ACAM's interest is heightened by the fact that it is the target of an ongoing FTC law enforcement investigation that is depleting its resources and inhibiting its and its members' ability to engage in the free exchange of ideas concerning the use of complementary and alternative medical therapies.

SUMMARY OF ARGUMENT

Congress limited the jurisdiction of the Federal Trade Commission ("FTC") to entities that are "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. The application of this statutory exemption to nonprofit professional associations has been a matter of considerable controversy and confusion and there is currently a conflict among the circuits on this issue. A single, clear test for determining jurisdiction is needed to give direction to the FTC and reliable guidance to the professional association community. Applying a test that attempts to measure the amount of "pecuniary benefit" various associations' activities confer on their members, the FTC has taken an increasingly expansive enforcement approach with respect to its jurisdiction over professional associations, even while the position it asserts in its litigated cases and before Congress continues to define, as

---

and no part of the profits or net income of this corporation shall ever enure to the benefit of any director, officer, or member or to the benefit of any private shareholder or individual.

required by Section 4 of the FTC Act, an apparently narrow basis for jurisdiction.

There is an urgent need for this Court to resolve the conflict in the circuits and to articulate a clear test for determining when, if ever, the FTC's jurisdiction extends to nonprofit professional associations – a category of nonprofit entities that has been subjected to a particularly high level of FTC regulatory intervention in recent years. Currently, in the two circuits that have adopted the "pecuniary benefit" test, any association that enhances the state of the science it studies, preserves the ethics its members observe, improves the quality of the care they provide, or advises regulators of the benefits and costs of public policies risks subjecting itself to the jurisdiction of the FTC. This cannot be what Congress intended when it prohibited the Commission from asserting authority over nonprofit associations. The Court should direct the Commission to follow the Eighth Circuit's interpretation of the statutory limitation on its jurisdiction over nonprofit associations and clarify the kinds of association activities that might bring a nonprofit association within the Commission's jurisdiction. In addition, the Court should confirm that the FTC Act does not permit the Commission to assert jurisdiction over exempt activities simply because a professional association engages in some business activity.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN URGENT NEED TO RESOLVE THE CONFLICT IN THE CIRCUITS AND TO ARTICULATE A CLEAR TEST FOR DETERMINING WHEN, IF EVER, THE FTC HAS JURISDICTION OVER NONPROFIT PROFESSIONAL ASSOCIATIONS

The court below acknowledged that there is a conflict among the circuits on the question of when, if ever, the FTC has jurisdiction over nonprofit professional associations. The conflict alone puts nonprofit associations in a position of uncertainty that inhibits their legitimate public service and member service activities. The uncertainty, however, is compounded by the fact that the jurisdictional test that has been adopted in two circuits is so broad that it would permit the FTC to regulate virtually any activity of any association. This situation arose out of cases from the Eighth and Second circuits during the past three decades.

In 1969, the Eighth Circuit addressed the question of the FTC's jurisdiction over hospital and blood bank associations by considering whether they were organized to carry on "business for profit within the traditional meaning of that language."[3/] In the court's view, merely engaging in some business activities does not bring an association within the jurisdiction of the Commission.[4/] A decade later, in a case involving the

---

3/ *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1018 (8th Cir. 1969).

4/ *Id.* at 1019.

American Medical Association ("AMA"),[5/] the Second Circuit applied a very different test – a test articulated in the Commission's opinion that bases a finding of jurisdiction on an examination of the association's activities to determine whether it "provides tangible, pecuniary benefits to its members."[6/] In the matter now before the Court, the Ninth Circuit adopted the *AMA* "tangible pecuniary benefits" test.

This important jurisdictional issue has been before this Court only once since enactment of the FTC Act in 1914[7/] -- in 1982 in the AMA case. Because the Court did not issue an opinion in that case questions remain unresolved, to the detriment of the affected professional associations and the public they serve. The "tangible pecuniary benefits" test is so broad and nonspecific that it lends itself to interpretations that effectively nullify the statutory limitation for nonprofit associations. While the *Community Blood Bank* standard is truer to the statutory language, to some extent it too leaves open

---

5/ *American Medical Ass'n ("AMA") v. FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982).

6/ *AMA v. FTC*, 94 F.T.C. 701, 785 (1979).

7/ Section 4 defines "corporation" as

> any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members. 38 Stat. 717, 719.

to question the kinds of activities that might bring a nonprofit association within the jurisdiction of the FTC.

Resolution of the conflict and the articulation of a single, clear standard for the FTC to follow are urgently needed. The Commission has made the investigation of nonprofit professional associations a high priority in recent years. In the absence of a test defining the boundaries of its jurisdiction in a workable and predictable way, the FTC has strayed from the clear meaning of the statute. Today, the Commission's enforcement policies simply cannot be reconciled with the plain language of Section 4.

II. THE PECUNIARY BENEFIT TEST IS INCONSISTENT WITH THE NARROW BASIS FOR JURISDICTION OVER NONPROFIT ASSOCIATIONS DEFINED IN SECTION 4 OF THE FTC ACT

Section 4 of the FTC Act limits the agency's jurisdiction to entities "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. On its face this language excludes nonprofit professional societies and nothing in the legislative history of the FTC Act indicates than Congress intended otherwise. Section 4 reflects Congress' intent to give the Commission jurisdiction only over for-profit, commercial organizations that meet the definition of being organized to carry on business for their own or their members' profit.

The Commission took an expansive view of its statutory authority in *Community Blood Bank*, but the Eighth Circuit reversed, interpreting the language of the FTC Act clearly and literally. Commission jurisdiction, the court found, must depend upon a determination of whether the organization

"*engages in business for profit* within the traditional meaning of that language."[8/] Drawing an analogy to a "religious association [that] might sell cookies at a church bazaar,"[9/] the court recognized that marketing activities such as selling blood for profit are "of no relevance" to the question of FTC jurisdiction as long as any income gained is devoted to the nonprofit purposes of the organization.[10/] In reversing the FTC's finding of jurisdiction, the court quoted Commissioner Elman's "cogent"dissent, in which he described the "clear import of the Commission's holding . . . [as reading] Section 4 out of the Act altogether and hold[ing] . . . that its jurisdiction under the Act embraces *all* corporations, profit and nonprofit alike, whatever the circumstances."[11/]

Faced with the *Community Blood Bank* opinion, the Commission's analysis in the AMA case, as expressed in its brief to the Second Circuit, included both an acknowledgment of the limitations Section 4 imposes on its jurisdiction over nonprofit associations and recognition of the approach taken by the Eighth Circuit in *Community Blood Bank*.[12/] The FTC's analysis then went on to describe "a spectrum of association activities ranging from the purely eleemosynary to the purely

---

8/ *Community Blood Bank* at 1018.

9/ *Id.*

10/ *Id.*

11/ *Id.*

12/ Respondent's Brief at 34 - 36, *AMA v. FTC.*

commercial"[13] that it would examine in deciding the jurisdictional issue. The Commission put charitable, cultural, educational and scientific activities into a category of "non-entrepreneurial"functions which are outside its jurisdiction.[14] The Commission's brief further defined this nonprofit category when it concluded that the AMA's activities devoted "to the advancement of medical science, education and public health, and . . . [its] scientific activities"[15] were not profit-promoting. As to all of these activities, the FTC's position before the court was that they could not be counted in determining whether the association engaged in more than incidental commercial activity.

Turning to the commercial end of the spectrum of association activities, and recognizing, as the Eighth Circuit had in *Community Blood Bank,* that every association engages in some business activities, the FTC gave further assurances against jurisdictional overreaching when it told the *AMA* court in its brief that when a nonprofit association "serves both the profit-oriented entrepreneurial interests of its members and their non-entrepreneurial interests [the association] is within the scope of Section 4 [but only] with respect to its profit promoting aspects"[16] and only when the profit oriented

---

13/ *Id.* at 32.

14/ *Id.*

15/ *Id.* at 38.

16/ *Id.* at 32. At oral argument before this Court in the AMA case, the FTC confirmed this jurisdictional analysis when it said, "the Commission does not claim broad jurisdiction over nonprofit associations. It claims jurisdiction over nonprofit associations made up of entrepreneurs when

activities are substantial: "The commercial part of the spectrum is subject to the FTC Act but that part must be a substantial, not incidental, portion of the whole."[17]

While it acknowledged the jurisdictional constraints the Eighth Circuit had defined in *Community Blood Bank*, the Commission advocated, and the Second Circuit adopted, a very different test for jurisdiction, and that test represents a significant departure from the clear meaning of Section 4 that formed the basis for the *Community Blood Bank* holding. Both the FTC and the Second Circuit based their findings that the AMA fell within the scope of Section 4 on certain activities that conferred, not profits, but "pecuniary benefits" on the association's members. Among the activities cited in both opinions as profit-promoting were lobbying for legislation that "may be for the profit of its members . . . [and] render[ing] business advice to its members."[18]

Although the *AMA* "pecuniary benefit" test was accompanied by multiple references to the nonprofit jurisdictional limitation, in practical effect, substitution of the "pecuniary benefits" analysis for the Eighth Circuit's straightforward standard based on the language of Section 4 (whether the organization "engages in business for profit within the traditional meaning of that language") permits the Commission to engage in exactly the kind of jurisdictional

---

those associations are engaged in substantial part in operating for the profit of those entrepreneur members." Record at 38-39, *AMA v. FTC* (No. 80-1690).

17/ *Id.* (emphasis added).

18/ *AMA v. FTC,* 638 F.2d at 447-48.

overreaching that the Eighth Circuit overruled in *Community Blood Bank*. It also complicates the process of determining which, if any, professional associations fall within the FTC's jurisdiction by requiring an examination of each and every "activity" an association engages in.[19/] Precisely what should count as eleemosynary activities and what should count as profit-making has remained at the heart of the controversy that came to this Court in the AMA case sixteen years ago. The issue was evident in the exchange between this Court and counsel for the AMA:

> MR. MINOW: Would you believe that it was contended here that our continuing education programs are for the profit of our members, because if you learn something there, you'll get more patients. That's silly . . . .
>
> QUESTION: Is the cost of attending those programs deductible for income tax purposes?
>
> MR. MINOW: I would think so, Justice Stevens.
>
> QUESTION: Because they produce income.

19/ By comparison, the Eighth Circuit in *Community Blood Bank* found that marketing activities and profit making are "of no relevance" to the issue of whether the FTC has jurisdiction as long as any income is devoted to the nonprofit purposes of the organization. (*Community Blood Bank* at 1018.)

MR. MINOW: I would think so, but I don't think that has anything to do with whether the AMA or the Connecticut Medical Society or the New Haven Medical Society were organized for the purpose of producing profit for their members. That's a different question.

QUESTION: I suppose, Mr. Minow, that if it is deductible, and I would assume that it is, it's on the same basis that a schoolteacher taking summer courses can deduct summer courses at the university.

MR. MINOW: To advance your skills or advance your – right. I would think so, Mr. Chief Justice.

> QUESTION: But that isn't probably profit making except that it's profitable for the teacher in the long run, but we would hope for the public too.[20/]

Sixteen years of experience have not answered these questions. The case now before the Court demonstrates the need to do so. In affirming the Commission's finding of jurisdiction, the Ninth Circuit in this case reverts to the approach taken by the Commission and overruled by the Eighth Circuit in *Community Blood Bank* and thereby effectively nullifies the jurisdictional exemption Congress wrote into Section 4 of the FTC Act.

20/ Record at 14-16, *AMA v. FTC* (No. 80-1690).

In its brief to the Ninth Circuit in this case, the Commission acknowledged the statutory limitation on its jurisdiction and described that limit by stating, as it had in *AMA,* that it has jurisdiction over a nonprofit association if the association provides "economic" or "pecuniary" benefits and those "benefits are a 'substantial part of' its total activities."[21/] But, as in *AMA,* despite an expressed recognition of the nonprofit exemption, the Commission's analysis led it to identify, a very broad range of "pecuniary benefits" -- including lobbying and litigation affecting members' businesses, insurance plans and practice management advice[22/] -- which led to the conclusion that CDA was within its jurisdiction.

In affirming the FTC's jurisdictional finding, the Ninth Circuit began its analysis by agreeing with the Eighth Circuit that the FTC's authority "turns on whether [the association] is organized to carry on business for its own profit or that of its members"[23/] Unlike the *AMA* court, however, the Ninth Circuit explicitly departed from the Eighth Circuit's reliance on the traditional meaning of the statutory language set out in *Community Blood Bank.* The court decided instead to apply what it described as the more "expansive view of 'profit'"[24/] adopted by the Second Circuit in *AMA* -- "tangible pecuniary benefits" to CDA members.

21/ Respondent's Brief at 25, *California Dental Ass'n ("CDA") v. FTC.*

22/ *Id.* at 24.

23/ *CDA v. FTC,* 128 F.3d 720, 725 (9th Cir. 1997).

24/ *Id.* at 726.

Among the activities found by the Ninth Circuit to constitute "tangible pecuniary benefits," were lobbying for insurance and Medicare reform, the regulation of members' advertising and solicitation, and providing continuing education. The court specifically encompassed in its analysis of activities that could be counted as justifying FTC jurisdiction, those that might "indirectly make members' practices more efficient and reduce their costs."[25/]

If the FTC and the courts continue to use the "pecuniary benefit" test, and if all the activities enumerated in the AMA and CDA cases can support FTC jurisdiction over nonprofit associations, then there is no longer any meaningful limit to that jurisdiction.

III. THE *COMMUNITY BLOOD BANK* TEST IS A PROPER INTERPRETATION OF SECTION 4

In *Community Blood Bank*, the Eighth Circuit specifically rejected the notion that a nonprofit association becomes a profit-making entity under Section 4 simply by engaging in some activities that a commercial enterprise engages in – *e.g.,* by operating in a businesslike manner that benefits its members, by receiving income from securities, or by making a profit. So long as nonprofit entities are "validly organized and existing under nonprofit corporation statutes . . . [and] do not distribute any part of their funds to and are not organized for the profit of members or shareholders" then they remain beyond the reach of the FTC.[26/] Even if the value of an association's activities

---

25/ *Id.*

26/ *Community Blood Bank* at 1019.

explains why members are willing to pay for membership, under the *Community Blood Bank* standard the association is not subject to the jurisdiction of the FTC.

The Ninth Circuit's adoption in this case of the *AMA* "pecuniary benefits" analysis only confirms the wisdom of the *Community Blood Bank* test. While the FTC has long acknowledged that an association's educational efforts should remain outside the agency's jurisdiction,[27/] the Ninth Circuit now lists continuing education of the members as one of the apparent bases for jurisdiction over the association.[28/] Similarly, although an association's effort to preserve the integrity of the profession by the legitimate regulation of its members' advertising is a laudable nonprofit objective, the Ninth Circuit cites such activity as evidence of the commercial nature of the CDA.[29/] Moreover, both the Ninth and Second Circuits regard the exercise of a First Amendment right to petition a government body (*i.e.*, lobbying for regulatory reform) as evidence that the nonprofit association has turned to the business of operating for the profit of its members.[30/] Thus, in two circuits, any association that enhances the state of the science it studies, preserves the ethics its members observe, improves the quality of the care they provide, or advises regulators of the benefits and costs of public policies thereby risks subjecting itself to the jurisdiction of the Federal Trade

---

27/ *See, e.g.*, the Commission's brief to the Second Circuit in *AMA*, *supra* n. 13.

28/ *CDA* at 726.

29/ *Id.*

30/ *CDA* at 726; *AMA* at 448.

Commission. This is not the law in the Eighth Circuit. More importantly, this cannot be what Congress intended when it prohibited the Commission from asserting authority over nonprofit associations.

IV. FAILURE TO OBSERVE THE CONSTRAINTS OF SECTION 4 WILL TEMPT THE COMMISSION TO BECOME A FEDERAL REGULATOR OF THE QUALITY OF CARE

After this Court divided on the Second Circuit's decision in *AMA*, the Association took its case to Congress and proposed legislation that would have diminished the FTC's authority by exempting state-licensed professionals from its jurisdiction altogether. Before Congress was the question whether the FTC was impermissibly intruding into the regulation of the services performed by professionals -- so-called "quality of care" issues traditionally regulated by the states. Responding to this jurisdictional threat, the FTC Chairman assured the Senate leadership that while the Commission had, over the years, examined certain practices of certain professionals and their organizations, the agency's activities did not

> derive from any desire to regulate the professions. . . . Our objective, in both our competition and our consumer protection activities, is to enhance the ability of informed consumers to act as ultimate regulators of the market. . . . . The Commission's activities in this area have not sought to interfere either with legitimate self-regulation or with the authority of the

states to assure the quality of services to their citizens."[31/]

A later letter from Chairman Miller to Senator Packwood confirmed that the FTC's interest in regulating professionals had historically extended only to "business practices" as distinguished from quality of care issues or "scope" of practice.[32/] In sum, Chairman Miller characterized the limitations on the FTC's regulation of professionals by emphasizing that the FTC's regulatory efforts are aimed only at the business activities of business establishments, not the regulated practices of members of nonprofit professional associations. With these representations, Congress defeated the AMA's proposed exemption.

Today, assuring the quality of medical services to patients in the U.S. remains the responsibility of the states. This authority is typically exercised by state medical boards, whose primary responsibility is "to protect the public from the incompetent, unprofessional, improper, and unlawful practice of medicine, [and it] is determined by each state's medical practice act."[33/] In 1995, the Federation of State Medical Boards of the United States, citing concern that recent legislative

---

31/ Letter from FTC Chairman James C. Miller, III to Honorable Bob Packwood, Chairman, Senate Comm. on Commerce, Science and Transportation and Honorable Bob Kasten, Chairman, Subcomm. on Consumer Protection (March 11, 1982).

32/ Letter from Chairman Miller to Honorable Bob Packwood (May 27, 1982).

33/ Federation of State Medical Boards of the United States, Report of the Special Committee on Health Care Fraud at I-40 (April 1997).

initiatives could restrict the ability of individual medical boards to regulate questionable health care practices, established a committee to develop recommendations to assist boards in "evaluating, investigating, and prosecuting physicians engaged in such practices."[34/] The committee has reported its recommendations, and principal among them is the conclusion that collaboration between state medical boards and the FTC would be an effective way to "stop the spread of questionable health care practices."[35/] Specifically, the committee recommended that boards expand their liaison with the FTC in order to identify physicians who may be engaging in questionable health care practices,[36/] use the FTC as a source of information in their evaluation of such practices,[37/] and coordinate with the FTC on avenues of potential prosecution against targeted physicians.[38/]

Prosecuting questionable health care practices or assisting state boards in their physician prosecutions is precisely contrary to the representations the Commission made to Congress during the AMA debates. But in light of recent actions of the Commission, it is all too conceivable that the agency could heed the call to join forces with medical practice regulators who appreciate the investigative, prosecutorial, and remedial powers of the Commission. Already, the agency has

---

34/ *Id.*

35/ *Id.* at I-50.

36/ *Id.* at I-42.

37/ *Id.* at I-44.

38/ *Id.* at I-46-47.

begun to take positions on the merits of certain medical therapies and to communicate its views directly to doctors. In the area of eye surgery, the Commission joined in the Food and Drug Administration's warning to doctors about the appropriate standards that govern claims for medical procedures they might use.[39/] In an advisory recently issued by the FTC on its website, the Commission also warns the public about the limitations of laser ocular surgery and invites consumers to contact the agency with questions or information concerning questionable practices. These activities are difficult to distinguish from the evaluation and regulation of medical procedures -- the very area in which the FTC has repeatedly denied it has jurisdiction or regulatory interest. Of particular concern to ACAM is that if the agency intends to regulate medical practices, it can easily assert that its jurisdiction reaches associations that educate physicians or the public about those practices.

V. THE COURT SHOULD GRANT THE PETITION AND CLARIFY THE DISTINCTION BETWEEN NONPROFIT ACTIVITIES AND PROFIT-MAKING BUSINESS UNDER SECTION 4

The distinction between profit-making activities and non-profit services has grown increasingly difficult to draw in the context of professional associations. If the Commission can declare associations to be generating pecuniary benefits by providing continuing education to their members, then this

---

39/ Letter on PRK promotion and advertising from Lillian J. Gill, Director, Office of Compliance, Center for Devices and Radiological Health, FDA and Dean C. Graybill, Associate Director, Division of Service Industry Practices, Bureau of Consumer Protection, FTC to Eye Care Professionals (May 7, 1996).

federal agency can decide whether an association's instructors have properly substantiated and qualified their medical lectures. If the Commission can second-guess the decisions of an association that advises the public about therapies or regulates the claims of its members, then the agency can determine what the public learns about available care and how doctors communicate with their patients. If the Commission can assert jurisdiction over associations that educate regulators about the impact of public policy, then the agency can alter the course of state regulation of the professions. Fifteen years ago, AMA voiced concerns such as these to Congress and the courts. What once may have been warnings of remote danger now must be considered alarms of imminent risk. Only by clarifying the Commission's jurisdiction over professional associations can this Court allay those concerns.

Pecuniary benefits cannot serve as useful characteristics to distinguish profit making from public service. Continuing medical education, maintaining ethical standards and regulating the quality of care should remain the concern of the states and the professions they regulate. Professional associations that facilitate these processes are providing public services -- which also are of pecuniary value to their members. A better educated doctor or dentist may indeed be more efficient and therefore more profitable. A more ethical advertiser may be more valuable to society, and in the long run, more profitable for the practice of medicine. Efforts to inform public policy may redound to the pecuniary benefit of doctors and dentists, as well as their patients. Consequently, associations that advance these goals on behalf of their members may provide services that members would gladly pay for. Such associations, however, were not the concern of Congress in 1914, and they should not

be the concern of the FTC today. The Circuit Courts, however, cannot agree.

ACAM urges the Court to grant the petition of the California Dental Association, and to apply and clarify the test that *Community Blood Bank* announced when the Commission first sought judicial recognition of "pecuniary benefits" as a means to circumvent the intended limitations of Section 4. The conflict in the circuits has allowed the Commission to put nonprofit associations on a par with commercial public corporations. Until the agency is ordered to follow a clarified version of *Community Blood Bank* it could threaten prosecution of and bring cases that Congress never intended it to undertake.

CONCLUSION

For these reasons, the petition for certiorari in this case should be granted.

Respectfully submitted,

ROBERT A. SKITOL
DRINKER BIDDLE & REATH LLP
901 Fifteenth Street, NW
Suite 900
Washington, D.C. 20005
(202) 842-8800

WILLIAM C. MACLEOD*
ELIZABETH TONI GUARINO
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, NW
Washington, D.C. 20007
(202) 342-8400

May 29, 1998

**Counsel of Record*